

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2007 Session

**PAUL RICHARD (DICK) DEAN and wife, VICKI MAE DEAN, v. ESTATE
OF EVA STANLEY and ESTATE OF CHARLES ALLEN STANLEY,
CHARLES ALLEN STANLEY CONSERVATORSHIP**

**Direct Appeal from the Probate Court for Scott County
No. 149-P, 804-P Hon. James L. Cotton, Jr., Judge**

No. E2006-02570-COA-R3-CV FILED JULY 25, 2007

In these estate cases, the Trial Court construed the Will of Eva Stanley and ordered her house sold and the proceeds distributed intestate. He denied executrix fees from her Estate for mishandling the Estate, but awarded claims for the conservators caring for the ward, Charles Allen Stanley. On appeal, we reverse the construction of the Will by the Trial Court, affirm the Trial Court on denying executrix fees, but reverse the Trial Court's awarding fees for the conservators' care of the ward.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Probate Court affirmed in part, and reversed in part.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Harold G. Jeffers, Oneida, Tennessee, for appellants.

Max Huff, Oneida, Tennessee, for appellee.

OPINION

The issues in the Trial Court were the application of fees by the fiduciaries and the interpretation of the decedent's Will.

Eva Stanley died on June 18, 1994, and her Will was probated in the Scott County Probate Court. Ms. Stanley's sisters, Etta West and Ethel Bridges, were named co-executrixes and co-trustees in the Will. The Court issued letters testamentary to the designated fiduciaries.

Ms. Stanley's Will provided for specific bequests of money¹ and personalty to Ms. West and Ms. Bridges, as well as a specific monetary bequest to her nephew, Bob Bridges. The Will further provides that:

Should Bob Bridges immediately upon my death move into my residence and remain there to provide for the continuous care of my son, Charles Allen Stanley, he shall receive, at the end of the first year following my death, an additional sum of \$10,000, and so long as he continues to meet this condition he shall receive, on each anniversary of my death, an additional sum of \$10,000, for a total of five years and a total additional sum of \$50,000.

Ms. Stanley's Will bequeathed in trust her real property and automobile to her son, Charles Allen Stanley, to be used for his sole benefit during his lifetime. The Will then states:

It is my desire that Bob Bridges and his wife, immediately upon my death, move into and remain in my residence for so long as they will properly care for my son, Charles Allen Stanley, in that residence. The home and vehicles, upon the death of Charles Allen Stanley, shall pass to the guardian in charge of his care and custody at the time of his death, if that guardian properly cared for him until the time of his death.

The Will then bequeaths the remainder of Ms. Stanley's property to be held in trust for her son, Charles. The Will names Etta West and Ethel Bridges as co-trustees of the property held in trust for Charles, and also names them as his guardians, with Bob Bridges to be the successor guardian.

The Probate Judge filed a Memorandum on March 4, 1996, stating that a conservatorship needed to be established for Charles, with a full and complete accounting of his property, to insure his needs were met. Subsequently, on July 17, 1998, Etta West filed a Petition for Appointment of Conservator, and she was appointed conservator for Charles that day.

In 2004, a Summary of the Accounting of Funds Left by Eva Stanley at the Time of Her Death was filed with the Court, which stated that Eva Stanley, at the time of her death, held funds in various banks in the amount of \$927,263.43, and that interest in the amount of \$111,499.00 had accrued since that time. The Accounting states that \$463,484.00 had been expended from those funds, leaving a balance of \$575,278.00. In November 2004, Etta West filed a Petition seeking fees for her actions as executrix of Ms. Stanley's estate, and also sought payment for her services in caring for Charles Stanley. Vicki Dean, her daughter, also filed a Petition seeking fees for her

¹\$100,000.00 each to Ms. West and Ms. Bridges and \$50,000.00 to Bob Bridges.

services in caring for Charles in the eleven months preceding his death. He died on January 3, 2004. Ms. Dean was apparently named co-conservator of Charles at some point, although no order appears in the technical record.

A hearing was held on July 31, 2006, regarding the fee applications of Etta West for her services as executrix and co-conservator, the fee application of Vicki Dean as co-conservator, and the construction of the Will as to the real property. The Court heard argument from the attorneys, and they stipulated that Vicki Dean and her husband had lived with Charles Stanley in the house at issue for eleven months preceding Charles' death. The parties also stipulated that Bob Bridges and his wife never moved into the house, and the Court heard the testimony of Ms. Dean and Bob Bridges. Following the evidentiary hearing, the Court held that Etta West should be awarded no compensation for services as personal representative of the decedent's estate "due to the lack of filing of statutory required accountings and reports, commingling funds, and due to the fact that efforts cost the estate money, and it would be an injustice to award any fee."

Further, the Court ruled:

With regard to the fee application of Etta West for her services as co-conservator of Charles Stanley, the Court finds she did not file proper accountings or reports with the Court. Her lack of financial responsibility resulted in confusion that took years to unravel.

The Trial Court, however, determined that she had provided care for Charles Stanley for eight years and he awarded her \$10,000 per year for services provided.

With regard to the fee application for Vicki Dean, the Court held that she had provided good care to Charles Stanley for 11 months, and while she did not file reports, or accountings, as "she was not privy to the finances", he found that she should be compensated in the sum of \$19,369.50 for the care she provided for Charles A. Stanley.

As to the house and real property, the Court found that:

the decedent, Eva Stanley, intended Bob Bridges to be the primary guardian to come into the house and take care of Charles A. Stanley. Mr. Bridges never made a conscious decision to not take care of Charles A. Stanley. He awaited legal direction. The house was expanded to add an apartment, with the original intent being that it would be for the caretaker to move in and take care of Charles A. Stanley. The apartment was not available for the caretaker and according to the Will, Mr. Bridges should have been called and given the opportunity to take care of Charles A. Stanley. Bob Bridges stood ready, willing, and able, but the opportunity was not given to him. The family line that would have been enriched by his failure to move in, thwarted his opportunity to do so. The family that was exercising dominion and control and the people that would benefit were in charge of the circumstances. Mr. Bridges never got

a reasonable opportunity to become a guardian at the house. It would be unjust enrichment and an unconscionable windfall for someone to get the house that only lived in it for eleven months, where Bob Bridges was never given an opportunity to do so. It would be inequitable and unjust enrichment for the person to also be awarded the house in addition to receiving compensation for taking care of Charles Stanley. Therefore, the Court found the house and property should be sold by public auction under such terms as the attorneys may arrange, providing a ten-day period for bidding to be re-opened by ten percent.

The proceeds were to be allocated as the Judge determined

The issues presented on appeal, are:

1. Whether the trial court erred in failing to enforce the Will as written, and instead ordering the house and car sold?
2. Whether the trial court erred in considering parol evidence to reach a different disposition for the house and car than that specifically provided for in the Will?
3. Whether the trial court erred by awarding fees to Etta West and Vicki Dean when the evidence indicated that Etta West had abused the ward's funds and had failed to provide an accounting?

Vicki Dean argues that the Court's decision to order the house sold at auction is contrary to the language in the Will, and that it was error for the Trial Court to consider parol evidence regarding the testatrix's intent in drafting the Will, as the Will is not ambiguous.

The construction of a will is a question of law for the court. *Presley v. Hanks*, 782 S.W.2d 482, 487 (Tenn. Ct. App. 1989). The standard of review is *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d). As the Supreme Court has stated:

the cardinal rule for interpreting and construing a will is to ascertain the intent of the testator and to give effect to that intent unless prohibited by law or public policy. Furthermore, such "intention is to be gathered from the scope and tenor of the whole will...."

In re: Estate of Vincent, 98 S.W.3d 146, 150 (Tenn. 2003).

We have stated, "[i]t is a general rule of will construction that the testator's intent is to be determined by referring to the will itself without looking outside the four corners of the document." *Hutchinson v. Neuman*, 2003 WL 22326961, *4 (Tenn. Ct. App. May 27, 2003). We have further explained:

Parole evidence is admissible to explain a latent ambiguity. A latent ambiguity is found where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of.

Id. fn.4.

A "patent" ambiguity ... is one which appears upon the face of the instrument, as, for example, a bequest to "some" of the six children of the testator's brother; while a "latent" ambiguity is one which is not discoverable from a perusal of the will but which appears upon consideration of the extrinsic circumstances, as, for example, a bequest to "my cousin John," it appearing that the testator has two or more cousins named John.

80 AmJur 2d § 1281 (1975). *Estate of Burchfiel v. First United Methodist Church of Sevierville*, 933 S.W.2d 481, 483 (Tenn. Ct. App. 1996)(citations omitted).

The trial court in this case did not specifically make a finding that the Will contained any ambiguity. Based on the court's Memorandum and Order, there is no showing that the Court actually considered parole evidence in construing the terms of the Will. It simply referred to the terms of the Will, and the testator's intent.

As to the decision reached by the Court, the Deans argue that it was error to order the house sold. The Will states in two different places that Ms. Stanley wanted Bob Bridges to move into the house and care for Charles until Charles' death. In the same paragraph where Bob Bridges was named to move in and care for Charles, the Will simply states, "The home and vehicles, upon the death of Charles Allen Stanley, shall pass to the guardian in charge of his care and custody at the time of his death, if that guardian properly cared for him until the time of his death."

The Will does not state that Bob Bridges is the only person who could be the "guardian" named in that bequest, and instead of expressly naming him, uses the term "the guardian", which leaves open the possibility that someone else could be the guardian. If Ms. Stanley intended Bob Bridges was the only person who could fulfill this role, she would have simply named him, as she did in the previous bequest, which stated that Bob Bridges would receive up to an additional \$50,000 in monetary compensation for taking care of Charles. It is obvious that no one else could receive the additional bequest of money, because it specifically names Bob Bridges, and had Ms. Stanley intended the same to be true for the house, then she could have simply employed similar language.

The Will is not ambiguous, and the only confusion created is by attempting to make this a specific bequest, when the testatrix left the option open that this role could be filled by someone other than Bob Bridges. We conclude the Will should be enforced as written, and there is no dispute that Vicki Dean was the guardian who was caring for Charles at the time of his death, and the intent of the language contained in the will provides that she be given the house.

The Trial Judge, in refusing to award the house under the provisions of the Will, seems to base his decision on “unjust enrichment” and “unclean hands”. These circumstances, in our view, would not allow the Trial Court to substitute his judgment for that of the testatrix. The right of a devisee is a legal right and not an equitable one. Accordingly, the equitable doctrine of unclean hands does not apply. *See Estate of Iverlett*, 1995 WL 571852 (Tenn. Ct. App. Sept. 29, 1995). If any “unjust enrichment” occurs in carrying out the terms of the Will, the criticism must be directed at the testatrix, as she could have prepared her Will in such a way to avoid such a result, but did not. *See, e.g., Smail v. Smail*, 617 S.W.2d 889 (Tenn. 1981).

As stated in *Cansler v. Unknown Heirs of Chairs*, 250 S.W.2d 579, 581 (Tenn. Ct. App. 1951), the general rule is that the intention of the testator should not be allowed to fail entirely “merely because it cannot be carried out in the precise manner contemplated by the testator. The will should be construed in a manner to take effect as far as possible if the result produced is one which it would be reasonable to assume the testator intended to accomplish, whether his full intention could be given effect or not.” In this case, the testatrix’ overriding intent was that Charles be well-cared for until his death, and that was accomplished. The testatrix obviously intended to reward the guardian who was caring for Charles at the time of his death by letting them have the house, and there is no dispute that Vicki Dean carried out this intent, albeit for a short period of time. Further, “the law presumes that one who undertakes to make a Will does not intend to die intestate, and the Courts will place such a construction upon the instrument as to embrace all the testator’s property, if the words used, by any fair interpretation or allowable implication would embrace it.” *In re: Will of Bybee*, 896 S.W.2d 792, 794 (Tenn. Ct. App. 1994). Accordingly, we reverse the Trial Court’s holding in ordering the house to be sold and the proceeds to pass by the laws of intestacy.

The Bridges argue the Trial Court erred in giving a fee to Ms. West and Ms. Dean for acting as Charles’ conservators, when they never filed any accounting of Charles’ funds, and did not show that his finances were handled properly. Tenn. Code Ann. §34-1-112 allows the Court to set a fee to be paid to a conservator, based on various factors, including the complexity of the ward’s property, the time spent in performing fiduciary duties, etc.

Tenn. Code Ann. §34-1-111 states that a conservator is to file a sworn accounting with the court within 60 days of each anniversary of the conservator’s date of appointment, and that the accounting “shall itemize the receipts and expenditures made during the period covered by the accounting”. The accounting is also to detail the property held by the conservator, and should include all bank account statements and financial documents, tax returns, etc. Tenn. Code Ann. §34-1-111(c). The statute further requires that if no accounting is filed, the conservator can be charged with the value of the assets, plus interest. Tenn. Code Ann. §34-1-111(g). An accounting can be

excused under certain circumstances, but there is no showing in this record that the accounting in this case was excused.

The only accounting filed in this case was an accounting of the assets held by the testatrix at the time of her death. The record does not contain any accountings related to the conservatorship or the ward's funds or property. Moreover, the Trial Court found that Ms. West and Ms. Dean failed to properly account for said property, and when testifying in court, Ms. Dean was asked what happened to Charles' assets when he died, and she replied that she did not know. Clearly, the conservators failed to comply with the statutory requirements regarding mandatory accountings, and could be charged with the value of the ward's assets.

We reverse the Trial Court's holding awarding compensation to Etta West's Estate,² and Ms. Dean. *State ex rel Laking v. Mallicoat*, 18 Tenn. App. 285, 75 S.W.2d 1031 (1934).

The Trial Court awarded the Estate of Etta West compensation for the eight years that she cared for Charles. The Trial Court held, and we concur, she never made any filings in the conservatorship. Moreover, she never made a claim for Charles' care and maintenance during the pendency of the conservatorship. The inference arises that she was caring for her nephew as a gratuity, and where she made no annual accountings and made no claims for reimbursement for his support, she may not later make such claims. *State ex rel Hickey v. Freeman*, 146 Tenn. 304, 241 S.W.2d 98 (1921).

We affirm the Judgment of the Trial Court denying the fiduciary fees for failure to make accountings, but reverse the Trial Court on allowing recovery for services rendered to the Ward by Etta West and Vicki Dean. We reverse the Trial Court's Judgment ordering the house and land sold and to pass by laws of intestacy.

The cause is remanded to the Trial Court with the cost assessed one half to the Estate of Eva Stanley and one-half to the Estate of Etta West.

HERSCHEL PICKENS FRANKS, P.J.

²Etta West died during the pendency of this action, and the action was revived by her Estate.